PREFACE AND ACKNOWLEDGMENTS

Normally a preface will give a list of the names of friends who have taken the trouble to read drafts of the manuscript, but I have found myself spontaneously adopting a slightly different and, I believe, more rigorous course. In the final stages of writing, over the last two years or so, I have accepted offers to participate in workshops where I could attempt a dry run of my ideas. As a consequence the work has had considerable feedback, but a price of participation is that versions of parts of the work have been published or are being published.

This book is in a remote sense a sequel to *The Decay of International Law* published by Manchester University Press in 1986. It takes up some of the themes of the first book: the contested role of legal doctrine, the problematic character of custom as a source of law, and the relationship of the state to the nation in the theory of international legal personality. However, on this occasion attention is devoted less to a critique of international lawyers and more to a rethinking of the tasks an international lawyer might undertake. There is here a real effort to break free of what I regard as irrelevant categories of thinking, although this always carries with it the risk that the discipline no longer recognizes what one is doing and reacts rather forcefully – this is what I mean by feedback.

For instance, I presented the first fifteen pages of Chapter 1 of the present book at a conference of French and Spanish international lawyers at Palma, Majorca, in May 2005.[1] The somewhat outraged response to my views can be understood, at least in part, by the sense, especially marked among continental international lawyers, that they are legal technicians and should not be expected to assume a creative intellectual role, which implies political and moral responsibilities.[2] Indeed, the view of the international lawyer as a thinker or intellectual is regarded as subversive and even dangerous, no matter how innocuous his message, precisely because it does not find its way into a recognizable technical path.[3] And this is the reaction of quite close and sympathetic friends and colleagues, such as Pierre-Marie Dupuy

and Karel Wellens. The marriage of philosophy and international law, so evident to Vitoria, Suárez, Grotius, and Pufendorf, is now quite firmly not to be revived. It is even presumptuous to attempt it, a forgetting of the modest place that belongs to the international legal technician.

The *Decay of International Law* met with very supportive reviews from David Kennedy and Peter Goodrich, which may have led to my being identified as a critical legal theorist, given the immense authority of these figures in the critical canon. This is very honorable company. However, there are a number of important respects in which I am, for better or worse, distinguishable from the Critical School. For instance, there is a history behind Chapter 6 of the book, which was first presented as part of a colloquium in the Hague Residence of Leiden University in September 2003.[4] At this seminar, organized by Susan Marks and Miklos Redner, there was a passionate debate between my friend and colleague Martti Koskenniemi and me, about my antiquated ''60s Leftism,' which it is true postmodern critical legal scholars have mostly left behind.[5] Indeed the works of Foucault and Baudrillard are premised on the collapse of the Left after 1968. I very much sympathize with this fact.[6] However, I believe nothing has changed in the socio-economic conditions of the world, which justified the original reformist zeal of the Left, and this chapter is a passionate, if unfashionable manifesto against the abandonment of the wider socio-economic picture. It has a ''60s' anti-American tone, which is 'uncool,' a point to which I will return later.

A further 'uncool' aspect of my work, which is evident in Chapter 6, is my belief in the right to self-determination of small nations. Indeed, their right to form states is still the best chance they have to organize and protect themselves in the face of globalization – a thoroughly modernist idea. There is hardly a series of propositions that could be more unfashionable in postmodern critical legal circles. I have been struggling with the idea of the apparent priority of states over nations in international law discourse for many years and pieces of my argument in Chapters 3 and 7 have appeared before.[7] My approach is not at all influenced by the desire to accommodate liberal political theory, which I consider very briefly in Chapter 7. Instead, my aim here is merely to show the relative backwardness historically of the idea of the state in relation to the idea of the nation. The latter idea represents a democratic advance and epistemological progress. It is only the most deplorable stepmotherly meanness of the discipline of international law which leads it to set so many hurdles in the way

of the free expression of peoples. No new nation should have to explain itself to self-styled liberal opinion in the old Western European or North American nations, whether in its positivist or its postmodern mood.

Another 'uncool' feature will appear to be the book's 'anti-American' tone, especially in Chapter 5, 'American Legal Cultures . . .'. I think this chapter is a rather standard exercise in postmodern cultural critique, an immanent critique of American discourse, based almost entirely on quite conservative American sources, particular Protestant American theological writing and classical American historiography. However, when I presented substantially the same paper at an international seminar in Innsbruck, organized by Hans Koechler, some European reactions evidenced unease at possible scapegoating of one country.[8] For myself there is the question of accepting responsibility as an international lawyer to confront actual problems. The US has been until the present the leading country to accept responsibility for the maintenance of international order. Critical reflection on American practice has to be central to what an international lawyer does. In the appendix to Chapter 4, I consider the postmodern lethargy of Europe when it comes to accepting such responsibility, and one sees it again at the time of writing in the initial reluctance of Europeans to contribute effectively to peacekeeping in Lebanon in August 2006. This reluctance is now changing and it may be that the anemic mood in Europe is becoming a thing of the past. Koechler's forum in Innsbruck was in any case free of the Chekhovian quality of much continental European international law debate.

Nonetheless, there is one fundamental sense in which I think this work remains profoundly critical, indeed postmodern and that is my final insistence upon a plurality of methods for undertaking international law *as an intellectual task in which the only sovereign the jurist should recognize is his or her own intellectual conscience*. If statesmen want their treaties and judges want their decisions to be analyzed and expounded, they can hire their own officials to do it for them. Such exercises are useful, but they are no more than what I call legal dogmatics in Chapter 1 of the book. What still needs to be done is precisely to indulge one's search for the foundations of one's own legitimacy, which obviously cannot be found in the terms of Article 38(1)(d) of the Statute of the International Court of Justice. It merely allows that the views of distinguished jurists could be evidence of the existence of rules of international law. A renewed role for doctrine must at present lead the international lawyer in search of intellectual

tasks, which his colleagues will not recognize as legal. In that case the struggle is to see who can finally appropriate the title 'legal.' In my view there is much more to do than to provide analytical indexes of treaties and judicial decisions. I believe that in Chapters 7 and 8 I merely recall the wider role that doctrine had until Vattel. As I was finishing this book, I was approached by a young international relations scholar, Daniel Joyce, to make a contribution to a symposium on 'Fear and International Order.'[9] This appeared as a direct challenge from a student of international relations to test the most radical chapter of the book at the hands of anonymous peer reviewers from that discipline. The feedback was very favorable. I believe this experience is confirmation that the audience I am trying to address in the concluding two chapters has to be this wider one of quite simply humanist scholarship, not marked by any particular discipline.

In his contribution to *Law after Ground Zero*, Bill Bowring quotes at length from the *Decay of International Law*. However, he goes on to prefer the expression used by David Chandler, a political scientist, as the title of his own chapter, 'The Degradation of International Law?' International law is no longer accepted by Western powers as a curb on the use of force. They prefer to appeal to what they call international justice, leading thereby to the degradation, not the development, of international law.[10] There is a crisis of acceptance of international law, which is not confined to a few restless, 'postmodern' legal spirits, but belongs to the widespread refusal of any place for international law in world society. International lawyers have to address this society, which they cannot simply do through authoritarian appeals to their own legal dogmatics. They have to find a language, which others can speak. Indeed the point of the title of this book, *Philosophy of International Law*, is that they have to learn to use many languages.

While I have been completing this book, I have also been working on another, an analysis of the form of legal advising, which takes place in departments of the British government when it is making foreign policy decisions. The logic of such work is quite different from this book. It endeavors to be purely positivist historical research, as far as that is possible in the practice of history. However, underlying such work is the wish to set standards for international legal positivism which I think it does not set itself. International legal positivism, insofar as it is not merely an aesthetic experience for those adhering to it, is an ideology for the celebration of the freedom of states. It is not, in my view, a framework for the analysis of a social

reality. So I have not been able to resist the 'uncool' idea of including as annexes to Chapters 2 and 4 studies which I believe expose the true nature of arguments about general customary law and about the legitimacy of the use of force in international relations.[11] The influence of the legal concepts is not negligible. However, they are part of the traditional practices of the states manipulating them, which have to be understand in the wider context of the management of the international public space and the reproduction of suppressed or otherwise forgotten national, collective memories.

Notes

1 In *L'Influence des sources sur l'unité et la fragmentation du droit international*, ed. Rosario Huesa Vinaixa and Karel Wellens (2006) 239–49, reproduced with acknowledgment to Bruylant.
2 See in particular, Pierre-Marie Dupuy, in *L'Influence des sources*, ed. Huesa and Wellens, xviii, where he says doctrine should not indulge itself with questions of its own legitimacy, but get on with the technical task of making more intelligible the increasing complexity of positive law. Dupuy insists precisely that writers should confine themselves to the role of legal dogmatics, ignoring the much wider role of doctrine, which I have identified and indeed taken from a standard French dictionary of legal usage.
3 See further Karel Wellens, in *L'Influence des sources*, ed. Huesa and Wellens, 271, who insists that the vast majority of those present at the colloquium agree that the international lawyer functions necessarily within an existing international legal system. A small minority took the view that the jurist could afford to defend an anti-systemic phenomenology. This reference includes my friend and colleague Ignacio Forcada within the small minority of two.
4 Published a year later in the *Leiden Journal of International Law* 17, no. 2 (June 2004) 247–70, with acknowledgment to Cambridge University Press.
5 Perhaps Anthony Anghie is an exception. Consider his *Imperialism, Sovereignty and the Making of International Law* (2005).
6 Indeed I edited a book called *Post-Modern Law* in 1990 in which I apply Baudrillard's ideas sympathetically to a critique of public law and the state. I draw on these arguments in Chapter 7 of the present book.
7 In chapter 3, pp. 87–91 appeared in 'The System of International Law: The Right to Self-Determination, Minority Rights and Patters of Human Rights Violations – Connections with the Break-up or Implosion of States', in the *European Yearbook of Minority Issues*, 1 (2001/2) 67–70, with acknowledgments to Brill Publishers; and pp. 95–105, in

'Convergences and Divergences in International Law Traditions', *European Journal of International Law* (2000) extracts from 716–32, with acknowledgment to Oxford University Press. Chapter 7, pp. 203–10, 213–18 appeared in 'The National as a Meta-Concept of International Economic Law', in Asif Qureshi (ed.), *Perspectives in International Economic Law* (2002) extracts from 69–76, with acknowledgment to Kluwer Law International.

8 The chapter has been published in *The Use of Force in International Relations: Challenges to Collective Security*, ed. H. Koechler (2006).

9 Chapter 8 will appear in the *Cambridge Review of International Affairs* 19(2), with acknowledgment here to Taylor and Francis.

10 Bill Bowring, 'The Degradation of International Law,' in *Law after Ground Zero* ed. John Strawson (2002) 3, quoting David Chandler, *From Kosovo to Kabul, Human Rights and Humanitarian Intervention* (2002).

11 Appendix to Chapter 2, 'Distance and Contemporaneity in Exploring the Practice of States: The British Archives in Relation to the 1957 Oman and Muscat Incident,' *The Singapore Yearbook of International Law*, IX (2005), 75–85, with the permission of the Faculty of Law, Singapore National University; and appendix to Chapter 4, 'The UK Invasion of Iraq as a Recent United Kingdom "Contribution to International Law" ', in the *European Journal of International Law* 16 (2005), 143–51, with the permission of Oxford University Press.